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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1941

No. 196

H. W. FERGUSON, *Petitioner*,

vs.

THE UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CORCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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To the Honorable the Supreme Court of the United States:

The petition of H. W. Ferguson respectfully shows:

QUESTION INVOLVED

Was the President of a Joint Stock Land Bank organized and operating under the Federal Farm Loan Act,

who purchased with his wife's money and for her benefit from the fee owner a tract of land encumbered with a lien to secure a loan made by the bank, guilty of embezzling and abstracting the moneys of the Bank under Section 984, Title 12, U. S. C. A., when he collected the profits from the investment and paid them over to his wife, the lien of the Bank having been kept alive and in full force and effect until the Bank's loan was finally paid off in full, principal and interest, and the Bank lost nothing by reason of the transaction?

STATEMENT OF THE CASE

Your petitioner was indicted in the District Court for the Northern District of Texas for a violation of Section 984, Title 12, U. S. C. A., was found guilty on five counts in the indictment (the first count having been by the District Judge withdrawn from the consideration of the jury), and was sentenced to serve eighteen months in Leavenworth and to pay a fine of ten thousand dollars generally on all counts of the indictment as charged. On appeal the United States Circuit Court of Appeals for the Fifth Circuit affirmed.

The applicable parts of the Statute are as follows, (the Statute in full is set out in the appendix.)

> "Any person connected in any capacity with any . . . joint stock land bank, who embezzles, abstracts or wilfully misapplies any moneys, funds or credits thereof . . . with intent to defraud such institution . . . shall be punished by a fine of not ex-

ceeding $5000.00, or by imprisonment not exceeding five years, or both."

The record on the first appeal of this case, (112 Fed. (2d) 132) was identical with that on the present appeal, and the statement made by the Circuit Court of Appeals on said first appeal is applicable here; and is correct with the following exceptions:

(1) The Court was in error when it said "*When a purchaser could not be found* the clerk would convey title to the Bank, which would close the loan record and put the land in the real estate account."

The fact proven was that the custom—the invariable rule—was, not when a purchaser could not be found, but that simultaneously with the deed from the borrower and owner of the land to the clerk a deed was prepared and signed by the clerk conveying title to the Bank; the loan record was at once closed and the land put into the real estate account. This for the protection of the Bank. This deed was not put of record but was kept in the files of the Bank. (R. 53-54-55).

In the instant case the deed from the owner of the land was not made to a clerk in the office of the Bank. It was made to a long time friend and business associate of Ferguson, S. K. Fowler, a farmer on a large scale who lived in the county where the land lay; no deed was prepared for Fowler conveying title to the Bank; and no deed was ever executed by Fowler conveying title to the Bank. The loan record in the Bank

was not closed nor was the land put into the real estate account. (R. 305-306-371-373).

(2) In its opinion the court says "according to Ferguson the Bank was to credit the $1000.00 paid by Mrs. Berkman for her release, and retain the balance of the loan as its investment, Fowler taking title subject to the loan for the benefit of Ferguson's wife."

Ferguson not only so testified, but the uncontradicted written evidence in the case introduced by the Government viz: (1) the release from the Bank to Mrs. Berkman (R. 38); (2) the deed from Mrs. Berkman to Fowler, (R. 83), and (3) the deed from Fowler to Deutschman, (R. 134-135), each in express terms provided that the Berkman note and the lien on the land securing the same were kept in full force and effect. It follows as a fact proven that the deed from Mrs. Berkman to Fowler was not in cancellation and satisfaction of the Berkman note and the lien on the land securing the same. Not being in such satisfaction, were Fowler the nominee of the Bank in the deed from Mrs. Berkman—were he holding title for the Bank—the conveyance was without consideration. The record shows that neither Fowler nor the Bank paid to Mrs. Berkman a thin dime for her execution of the deed to Fowler.

THE PROCEEDINGS

Upon the conclusion of the evidence your petitioner, in his special requested charge No. 1, requested the Dis-

trict Judge to instruct the jury to return a verdict of "Not Guilty".

This was by the Court refused. (R. 11).

Thereupon your petitioner requested the District Judge to instruct the jury "If you find and believe from the evidence that *in the beginning* and prior to directing that the deed be made from Mrs. Berkman to Fowler, having already determined that the Bank did not wish and would not take the land but would retain only its lien, that the defendant Ferguson, acting for his wife, had formed the purpose to pay to the Bank the amount of money necessary to satisfy all of Mrs. Berkman's delinquencies and to put the loan in good standing and to have the title put in Fowler's name for his wife's benefit, then you will find the defendant Ferguson "not guilty".

This instruction was by the District Judge refused. (R. 12). Thereupon your petitioner requested the court to instruct the jury; "You are instructed that it is incumbent upon the Government to prove beyond a reasonable doubt that at the time H. W. Ferguson received the $2400.00 set out in the second court in the indictment, he did so knowing that the same belonged to the Land Bank; and if the Government has failed to so prove said fact, you will find the defendant 'Not Guilty' on said count."

This requested instruction was by the court refused. (R. 13).

Thereupon your petitioner requested the District Judge to instruct the jury, "Good faith of a defendant in a prosecution for misapplying, abstracting and converting to his own use certain moneys of the Dallas Joint Stock Land Bank is a complete defense. If, therefore, you find and believe from the evidence that the defendant Ferguson, in collecting and paying over to his wife the various sums of money, the proceeds of the Berkman farm, as set out in the indictment, did so in good faith, believing that said moneys were the property of his wife, then you will find him 'Not Guilty' ".

This instruction was by the court given. (R. 13).

Thereupon your petitioner requested the District Judge to instruct the jury, "You are instructed that it is incumbent on the Government to prove beyond a reasonable doubt that at the time the land in question herein went into the name of S. K. Fowler that it was H. W. Ferguson's intent and purpose that same should at the time be henceforth held by him as trustee for the Land Bank; and if the Government has failed to so prove said fact, you will find the defendant H. W. Ferguson 'Not Guilty' ".

This instruction was by the court given. (R. 14). Thereupon the District Judge delivered his charge to the jury. (R. 462-474).

Thereafter the jury returned into court the following verdict, "We, the jury, find the defendant guilty on all counts in the indictment". (R. 14).

Upon said verdict the District Court entered the following judgment.

> "On this 30th day of September, 1940, came the United States Attorney and the defendant, H. W. Ferguson, appeared in proper person and by counsel; and the defendant having been convicted on verdict of guilty of the offenses charged in the indictment in the above entitled cause to-wit; embezzlement from the Dallas Joint Stock Land Bank of Dallas, a National Farm Loan Association, and conspiracy . . .
>
> "It is by the Court ordered and adjudged that the defendant having been found guilty of said offenses is hereby committed to the custody of the attorney general for imprisonment in an institution of the Penitentiary type to be designated by the attorney general or his authorized representative for the period of eighteen months in the United States penitentiary, Leavenworth, Kansas, and a fine of ten thousand ($10,000.00) Dollars generally on all counts in the indictment as charged; and that said defendant be further imprisoned until payment of said fine or until said defendant is otherwise discharged as provided by law. It is further ordered that the clerk deliver a certified copy of the judgment and commitment to the United States Marshall or other qualified officer and that same shall serve as the commitment herein." (R. 16-17).

Defendant Ferguson filed a Motion for a New Trial. (R. 484-492).

The District Judge overruled said Motion for New Trial. (R. 493-494), giving at length his reasons for said action. (R. 495-497).

Defendant Ferguson perfected his appeal to United States Circuit Court of Appeals for the Fifth Circuit. (R. 502-513-493-494-498-513-514-515-516-524). Said United States Circuit Court of Appeals affirmed the judgment of the District Court May 6th, 1941. (R. .....).

Your petitioner filed a petition for Re-Hearing, (R. .....). Said petition was by said Circuit Court of Appeals denied, May 31st, 1941. (R. .....).

JURISDICTION

The jurisdiction of this court to issue the writ prayed for is conferred by the Act of Feb. 13th, 1925, Chapter 229, Sec. 1, Title 28, U.S.C. Sec. 347; Judicial Code Section 240, as amended; Act of February 24th, 1933, as amended March 8th, 1934, Title 28 U.S.C. Section 723(a); and Rule XI of the Rules of Practice and Procedure in this Court formulated May 7th, 1934.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

The Honorable The United States Circuit Court of Appeals for the Fifth Circuit has rendered a decision in conflict with Its Own Decision on the same matter, of date May 31st, 1940. (112 Fed. (2d) 132.)

In its decision of May 6th, 1941, the Honorable Circuit Court of Appeals for the Fifth Circuit has so far departed from the accepted and usual course of judicial

proceeding, or has so far sanctioned such a departure by the United States District Court for the Northern District of Texas, as to call for the exercise of This Court's power of supervision, in this:

The record in this case indicates that the United States District Judge erroneously was of the opinion that the President of a joint stock land bank organized and operating under the Federal Farm Loan Act, could not legally purchase, with his wife's funds, and for her benefit, a tract of land upon which the joint stock land bank had a lien to secure the payment of a loan made by the Bank to the owner of the land; and that by making said purchase he was guilty of embezzling and abstracting the funds of the Bank in violation of Sec. 984, Title 12, U. S. C., when he collected the revenues from the land and the profits of the investment and paid the same to his wife instead of to the Bank; and this, although the Bank's security was not lessened nor endangered; but was kept alive and in full force and effect until the Bank's loan was finally paid off in full, principal and interest, and the Bank had lost nothing by reason of the transaction.

By affirming the judgment of the United States District Court the Circuit Court of Appeals erroneously approved and sanctioned this opinion of the United States District Judge.

Upon the trial the Honorable the United States District Judge in his charge to the jury erroneously instructed them:

(1) "It appears from the uncontroverted facts in the case and as set out in the indictment . . . In this situation she (Mrs. Berkman) offered to give the Bank the land and $1000.00 besides if they would release her of the debt. The evidence shows or tends to show that the defendant Ferguson considered the land a fairly good prospect and accepted the proposition and accepted it in this form: that instead of conveying the land directly to the Bank it was to be conveyed to a person to be named by the Bank called a nominee; that nominee was S. F. Fowler." (R. 463).

This identical instruction was given upon the first trial of this case and was condemned by the Circuit Court of Appeals in the following language:

"But we think the court, impressed with Ferguson's accountability in equity as an agent and fiduciary of the Bank, erroneously made and refused charges on the critical question. In stating the uncontroverted facts he said that instead of conveying the land directly to the Bank they conveyed it to a person to be named by the Bank called a nominee for the Bank. That nominee was S. K. Fowler. Thus in the very beginning the jury was told that Fowler took for the Bank and not for Ferguson." (112 Fed. (2d) 132).

(2) "The defendant Ferguson was President of the Bank and as such was without power to take anything that was the Bank's and name someone as trustee to hold for him personally or for his wife." (R. 465).

This identical instruction was by the District Judge given to the jury on the first trial and was condemned

by the Circuit Court of Appeals in the following language:

> "This last sentence (Ferguson was without power to take anything that was the Bank's and name someone as trustee to hold for him personally, or for his wife) while true of anything that was really the Bank's, would be understood in the connection in which it was spoken as meaning that the land before it was deeded to Fowler was the Bank's and Ferguson was therefore without power to make Fowler his trustee."

And finally in reversing and remanding the cause the Circuit Court of Appeals said:

> "While the Charge in other parts of it submitted the vital issues to the jury, we think the parts of it we have criticised obscured them and tended to impress the jury with the idea that Ferguson's position of trust prevented any possibility of the land and the monies arising from it belonging to anyone but the Bank." (112 Fed. (2d) 132).

In addition to the foregoing instructions which had been given and adjudged erroneous by the Circuit Court of Appeals the Honorable United States District Judge erroneously instructed the jury as follows:

> "One acting as President of a Bank *is not at liberty to deal with the property of the bank* as though it were his own. It is his duty to keep in mind always the financial or pecuniary interests of the stockholders of such institution or those for whom he acts and in the exercise of this duty he should give the bank's interests preference over

his personal interest wherever there should be a conflict or he should refuse to act at all.

"And if the President of a Bank fails in the performance of this duty and uses opportunities that come before him to appropriate the *proceeds* of *property rightfully belonging to the Bank*, then the Bank acting through the directors and stockholders could at its election hold the President liable in equity for any profits he made *in thus dealing personally in a matter in which he should have dealt* for *the Bank alone*." (R. 468).

He further instructed the jury:

"An essential element of the offense is the intent to defraud. The circumstances surrounding it may be considered the conduct which may appear as tending to aid you in finding and discovering and in connection with this unless the testimony satisfies you to the contrary, you are warranted in holding a party responsible for the natural and probable and legitimate consequences of his acts. That is what is presumed in every case a man means. The defendant's intent to defraud the Bank is an indispensable element of each offense charged in the indictment. It is a presumption of law that one intends the natural and probable effect of the act he intentionally does. The presumption may be overcome by evidence. The defendant's testimony as to his intent and his explanation of his act and omission are competent and material evidence on the subject of his intent. Acts, however, are sometimes more persuasive evidence of intent than words. It is your duty to consider all the evidence; all of the acts and omissions and doings of the defendant, the

presumption that one intends the natural and probable effect of his act intentionally done." (R. 467-468).

And finally the Honorable District Judge erroneously charged the jury:

> "You are instructed in this connection that if the defendant Ferguson, knowing or believing that the Berkman land would probably result in yielding a profit over and above the indebtedness caused it to be handled in the name of Fowler for the purpose of realizing this profit personally and diverting it to his wife rather than the Bank, and that the use of Fowler's name and the manner in which the transaction was handled was intended only as a subterfuge then the defendant Ferguson when he received profits from such property would be guilty of abstracting the same from the Bank. On the other hand if it was placed in Fowler's name for Mrs. Ferguson in good faith and handled as a bona fide transaction and not as a subterfuge it would not be an act of abstracting money from the Bank." (R. 468).

The Honorable the Circuit Court of Appeals for the Fifth Circuit in its present opinion reviewing the entire Charge of the United States District Judge erroneously held:

> "At the request of the defendant the Court gave two special charges which stated the issues in a light most favorable to Ferguson. We have carefully read and considered the entire charge of the court and have found that it contains no error prejudicial to the rights of this appellant." (R. .....).

WHEREFORE your petitioner respectfully prays that a Writ of Certiorari be issued out of and under the Seal of This Honorable Court directed to the Circuit Court of Appeals for the Fifth Circuit commanding that court to certify and send to this Court for its review and determination on a day certain to be therein named a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 9706, H. W. Ferguson, Appellant vs. The United States of America, Appellee, and that the said judgment of The Circuit Court of Appeals for the Fifth Circuit may be reversed by This Honorable Court and that your petitioner may have such other and further relief in the premises as to This Honorable Court may seem meet and just.

Respectfully submitted,

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MAURY HUGHES,
WM. M. CRAMER,
Counsel for Petitioner.